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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 153

ALVIN F. FIX, COLLECTOR OF INTERNAL REVENUE for the First Collection District of Pennsylvania, petitioner

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL Surety Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Pennsylvania (R. 12) is reported in 60 F. (2d) 333. The opinion of the Circuit Court of Appeals (R. 19) is reported in 63 F. (2d) 258.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 6, 1933 (R. 19), and a petition for rehearing denied March 11, 1933 (R. 21). A

petition for a writ of certiorari was filed June 10, 1933, and granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the failure to substitute a Government officer as party plaintiff in a suit on a bond for the benefit of the United States within the six months' period prescribed by Section 11 of the Act of February 13, 1925, *infra*, p. 17, abate not only the immediate suit but also preclude a suit on the bond by a successor in office?

STATUTE INVOLVED

Section 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, is printed in the Appendix, *infra*, p. 17.

STATEMENT

On March 18, 1931, James S. MacLaughlin, Collector of Internal Revenue for the First Collection District of Pennsylvania, brought suit in the District Court of the United States for the Eastern District of Pennsylvania against the Philadelphia Barge Company and the National Surety Company to recover the sum of $12,635, with interest and costs (R. 2–5). The suit was founded upon a bond dated February 17, 1921, whereby the Barge Company, as principal, and the Surety Company, as surety, obligated themselves to Ephraim Lederer, Collector of Internal Revenue, "or his Successors," for the payment of so much of the amount claimed of the

income taxes assessed against the Barge Company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue (R. 4, 5-6). It was alleged by the plaintiff that he was one of Lederer's successors in office and as such brought the suit upon the bond (R. 3).

Respondents filed an affidavit of defense (R. 6–11) in which was incorporated, *inter alia*, a plea that the cause of action had "been lost" by failure to comply with the provisions of Section 11 of the Act of February 13, 1925, *infra*, p. 17. (R. 10.) This plea recited (R. 10) that in August 1926 one Blakely D. McCaughn, a former Collector, had sued upon the same bond; that judgment was awarded McCaughn for want of a sufficient affidavit of defense; that McCaughn resigned as Collector on December 31, 1927; that on December 13, 1930, a suggestion was filed in that case by the defendants (respondents herein) that the cause of action had abated under the provisions of Section 11 of the Act of 1925, because no substitution had been made of McCaughn's successor as party plaintiff within the six months' period prescribed by that Act; and that on December 22, 1930, the court entered an order striking the judgment from the record upon the ground that the action had abated prior to the entry of the judgment.

Upon a motion for judgment for want of a sufficient affidavit of defense (R. 11–12), the District Court sustained the plea in abatement contained in such affidavit and entered judgment for the respond-

ents herein [1] (R. 12–14). Although the District Court said that it assumed that MacLaughlin would have been the proper party to sue on the bond if no prior suit had been brought by McCaughn, it held that because there had been such a suit the failure of the Government to cause substitution to be made, after the plaintiff had left office, of his successor or successors, in compliance with the Act of 1925, resulted not only in the abatement of that suit but also of the Government's cause of action upon the bond. The court said that if this was not so "the abatement could be avoided and the Act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector," and that "In addition there is no injustice in refusing

[1] Prior to the entry of judgment in the District Court, the United States Attorney filed a suggestion of the death of MacLaughlin and requested the substitution of Albert H. Ladner, then Collector of Internal Revenue, as party plaintiff (R. 14). While no formal order of substitution appears in the record, an exception to the judgment was taken on behalf of Ladner (R. 15), the appeal to the Circuit Court of Appeals was applied for in his name (R. 17), and his name appears as the party appellant in all of the proceedings in that court (R. 18, *et seq.*). It furthermore appears that on June 2, 1933, the District Court entered an order *nunc pro tunc* correcting its judgment, which was entered after the death of MacLaughlin, so as to make it run against Ladner and not MacLaughlin (R. 22). This order has been incorporated in the record pursuant to a stipulation of counsel (R. 22). The record does not show the date of MacLaughlin's death, but we are advised by the Bureau of Internal Revenue that he died on June 11, 1932. As the suggestion of death was filed on July 20, 1932 (R. 14), it was within the six months' period prescribed by the Act of 1925. The United States Attorney at Philadelphia advises

to permit parties to be harassed by the necessity of defending more than one suit for the same cause of action when a very simple procedure is offered for the continuance to a conclusion of the action as originally brought" (R. 13 14). Upon appeal the judgment of the District Court was affirmed by the Circuit Court of Appeals for the Third Circuit in a *per curiam* decision (R. 19).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred —

1. In sustaining the judgment of the District Court that the affidavit of defense was sufficient because the cause of action had abated.

2. In holding that the cause of action had abated by reason of failure to substitute from time to time, in accordance with the provisions of the Act of February 13, 1925, the respective successors of the Collector bringing the original suit on the bond.

SUMMARY OF ARGUMENT

The courts below have misconstrued Section 11 (a) of the Act of February 13, 1925, *infra*, p. 17. The

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that "the substitution of Ladner as plaintiff in lieu of Joseph S. MacLaughlin, upon the death of the latter, is strictly in accord with the Pennsylvania practice, and an order of the Court for the same is not necessary. The attorney for the deceased party merely files the suggestion on the record and notifies the other party." On October 16, 1933, the Solicitor General filed with this Court a suggestion of the resignation of said Albert H. Ladner, Jr., as Collector of Internal Revenue for the First Collection District of Pennsylvania and requested the substitution of Alvin F. Fix, present Collector, as party petitioner, which motion was granted on October 16, 1933.

sole purpose of that legislation was to obviate the inconvenience and delay which resulted from the abatement of suits involving public officers because of the death or resignation of such officers or their separation from the service. It accordingly provided a procedure which, if followed, would eliminate the necessity of a new suit. But there is nothing in either the history or the wording of that legislation which does away with the right to bring a new suit, where the cause of action survives, merely because the procedure outlined by the statute is not followed.

The bond in this case was to Lederer, Collector, "or his successors." By the terms of the bond and *virtute officii* the right to sue upon this bond devolved upon the succeeding collectors in office. The decisions recognize that the right of action on a bond survives the passing of the original obligee from office. At common law the right of the incumbent to sue on the bond would continue to exist after a suit by a former collector had abated for want of proper parties. The statute was not meant to limit this right in any way. It was purely procedural and should not be extended beyond its obvious purpose.

Moreover, the construction adopted by the courts below has the effect of imposing a time limitation upon the enforcement of the bond—a result hardly intended by Congress.

ARGUMENT

This suit is against the principal and surety upon a bond given to secure the payment of Federal in-

come taxes. The bond was on February 17, 1921, delivered to Lederer, the then Collector, and named as obligee "Ephraim Lederer, Collector, First District, Pennsylvania, or his Successors" (R. 5). Lederer resigned as Collector July 31, 1921, and was succeeded by McCaughn. On August 6, 1926, McCaughn, then in office, brought an earlier suit upon this same bond. During the pendency of that suit, McCaughn went out of office December 31, 1927. He was succeeded by Brown, who acted until May 31, 1928, when he, in turn, was succeeded by MacLaughlin. No substitution of the succeeding Collectors as provided by Section 11 (a) of the Act of February 13, 1925 (*infra*, p. 17), was made within six months after the expiration of McCaughn's term (R. 13). Because of this failure to substitute, this earlier suit was abated (R. 13); whereupon this present suit was instituted by MacLaughlin, the then Collector.[2] The only question in this case is whether the failure to substitute Collectors in the earlier suit abated the cause of action as well as the writ in that case, thus precluding a second suit on the bond. It is the Government's position that the courts below misconstrued the Act of 1925 in holding that a new suit on the bond could not be brought.

Section 11 (a) of that Act, *infra*, p. 17, so far as pertinent, provides:

> That where, during the pendency of an action, suit, or other proceeding brought by

[2] With reference to the substitution in the present suit of MacLaughlin's successors in office, see footnote 1, *sup. a*, pp. 4–5.

> or against an officer of the United States * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, *it shall be competent* for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, *to permit the cause to be continued* and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for *so continuing* and maintaining *the cause* and obtaining an adjudication of the questions involved. (Italics ours.)

The precursor to this section was the Act of February 8, 1899, c. 121, 30 Stat. 822 (U.S.C., Title 28, Sec. 780).[3] The Act of 1899 was inspired by judicial decision and suggestion. This Court in a number of cases had held that a writ of mandamus issued against

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[3] The Act of February 8, 1899, read in part as follows:

"That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

the head of a Government Department was personal in its nature and not directed against the office and that the action abated upon the death, resignation, or removal of the individual. Thus a mandamus proceeding brought against the head of a Government Department might proceed as far as this Court and yet, because of its nature, would abate upon his death or resignation and the question of law involved could not be settled without first instituting a new suit against the successor in office. See *Secretary* v. *McGarrahan*, 9 Wall. 298 (Mandamus against the Secretary of the Interior); *United States* v. *Boutwell*, 17 Wall. 604 (Mandamus against the Secretary of the Treasury); *United States* v. *Chandler*, 122 U.S. 643 (Mandamus against the Secretary of the Navy); *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28 (Injunction against the Secretary of the Interior and Commissioner of the General Land Office); *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600 (Mandamus against the Commissioner of Patents).

In the *Butterworth* case, *supra*, decided March 21, 1898, the Court made this suggestion (p. 605):

> In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method.

It was in response to this suggestion that Congress passed the Act of 1899.[4] See *Murphy* v. *Utter*, 186 U.S. 95, 101; *Caledonian Coal Co.* v. *Baker*, 196 U.S. 432, 440–442; *Irwin* v. *Wright*, 258 U.S. 219, 222; *Ex parte La Prade*, 289 U.S. 444. See also H.Rep. No. 960, 55th Cong., 2d Sess. During the debate in the House upon the bill (Cong. Record, Vol. 31, Part 4, pp. 3865–3866), Mr. Connolly, from the Committee on the Judiciary, referring to the *Butterworth* case, *supra*, explained the purpose of the bill as follows (p. 3866):

> Some individual has been for years trying to get action by that Bureau [referring to the Office of the Commissioner of Patents] different from the action that Commissioner Seymour took in refusing him certain rights that he claimed. Seymour went out of office while the action was pending, and the suit abated. Butterworth was appointed, and the suit was resumed against Butterworth. It ran along against him through the various courts until it came to the Supreme Court, and during

[4] The Act of 1899 applied only to proceedings by or against officers of the United States and did not affect State officials. In *Irwin* v. *Wright*, 258 U.S. 219, this Court suggested that it would promote justice if Congress were to enlarge the scope of that Act so as to authorize substitution in suits by or against State officers. It was pursuant to this suggestion that the Act of 1899 was enlarged by the Act of February 13, 1925, here involved, and subdivision (b) of the latter Act, *infra*, p. 17, was inserted, making provision for substitution in proceedings brought by or against those holding office under State authority. See *Ex parte La Prade*, 289 U.S. 444, 457.

> its pendency he died and the suit again abated. Now the plaintiff is compelled to go back and commence against Commissioner Duell, the new Commissioner of Patents, without any assurance that Duell will live or remain in office long enough for the plaintiff to obtain a decision from the Supreme Court of the United States. The purpose of the bill is that the suit may survive if the defendant dies.

Thus, it is entirely clear that the sole purpose of the statute was to obviate the inconvenience and delay which resulted from the abatement of suits involving public officers because of the death or resignation of such officers or their separation from the service. It accordingly provided a procedure which, if followed, would eliminate the necessity of a new suit. But there is nothing in either the history or the wording of the statute which does away with the right to bring a new suit, where the cause of action survives, merely because the procedure outlined by the statute is not followed. The statute was designed solely to remove a common-law impediment to the continuance of certain suits. As stated in *Roberts* v. *Lowe*, 236 Fed. 604, 605 (S.D. N.Y.):

> This *remedial* act was to enable pending proceedings against public officials in their official capacity to be continued when necessary to obtain settlement of the questions involved. * * *

The Act was obviously intended as a liberalizing measure, and it would be entirely foreign to its pur-

pose to suppose that it was intended to take away any rights which had obtained at common law.

Moreover, the statute is not mandatory but merely permissive. *Brown-Crummer Inv. Co.* v. *City of Florala, Ala.*, 55 F. (2d) 238, 243 (M.D. Ala.). As this Court said in *Ex parte La Prade, supra* (p. 458):

> The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered. * * *

To construe this purely permissive, remedial statute as abolishing substantive causes of action, unless its terms are complied with, is to extend it far beyond its obvious purpose.

The bond in this case ran to "Ephraim Lederer, Collector, First District, Pennsylvania, or his Successors" (R. 9). The giving of the bond clearly gave rise to a cause of action separate and distinct from the right to collect taxes. Cf. *United States* v. *John Barth Co.*, 279 U.S. 370. This cause of action did not abate upon the death, resignation, or removal from office of the original obligee named in the bond. As was said by the Circuit Court of Appeals for the Second Circuit in *Bowers* v. *American Surety Co.*, 30 F. (2d) 244, 246 (certiorari denied, 279 U.S. 865):

> * * * the purpose of such bonds is to create an obligation in favor of the incumbents, as they succeed each other; * * *.

Aside from the fact that the bond in terms ran to the successors in office, it was, in its nature, an ordinary form of debt obligation. As such it was not destroyed by the death of the original obligee nor his separation

from office. Being given for an official purpose and having the attributes of transferability, all rights under this obligation passed to each successor in office of the original obligee as he assumed the office. Therefore, because of the nature of the obligation and by reason of its very terms and by virtue of their office, the right to sue upon the bond devolved upon Lederer's successors. See *McCaughn* v. *Union Paving Co.*, 60 F. (2d) 657 (E.D. Pa.), affirmed, 63 F. (2d) 258 (C.C.A. 3d); cf. *Webber* v. *St. Paul City Ry. Co.*, 97 Fed. 140, 145 (C.C.A. 8th).

The District Court admitted that (R. 23)—

> McCaughn was the proper plaintiff in the former suit, and, if no prior suit had been brought it may be assumed that MacLaughlin, the present collector, would be the proper party to sue, in spite of the fact that he is not the obligee in the bond.

The court thus correctly recognized that the right of action on the bond survived Lederer's (the original obligee) resignation from office. But while thus recognizing that the cause of action survived to each of Lederer's successors, the court is illogical, we submit, in deciding that the failure to substitute MacLaughlin in McCaughn's suit not only destroyed the suit but also the cause of action on the bond.

We think the former suit by McCaughn was properly abated since no substitution was made within six months after the expiration of his term as provided by the statute. This was proper under the general rule at common law that the termina-

tion or transfer *pendente lite* of the interest of the plaintiff in the subject matter of the suit abates it. But this abatement of the suit for failure to substitute as provided by statute, while a complete termination of that particular suit, does not defeat the cause of action or bar the issuance of a new writ or the institution of a new suit. *St. Romes* v. *Cotton Press Co.*, 127 U.S. 614, 619; *Marvin* v. *Baltimore & Ohio Railroad*, 151 U.S. 673, 703; *Macker* v. *Thomas*, 7 Wheat. 529, 532; *Green* v. *Watkins*, 6 Wheat. 260; *Elliott* v. *Teal*, Fed. Cas. No. 4,389 (Ore.); *Warren* v. *Furstenheim*, 35 Fed. 691, 693 (W.D. Tenn.); *Harrison* v. *Fire Insurance Co.*, 102 Iowa 112, 115; *Pitts Sons' Manf. Co.* v. *Commercial Nat. Bank*, 121 Ill. 582, 586 587. Whether the cause of action survives is a question of right and not of *procedure*, depending upon the substance of the cause of action. *Schreiber* v. *Sharpless*, 110 U.S. 76, 80; *Sanders' Adm'x* v. *Louisville & N. R. Co.*, 111 Fed. 708, 710 (C.C.A. 6th); *Martin* v. *Wabash R. Co.*, 142 Fed. 650, 651 (C.C.A. 7th). If, as we contend, the cause of action survived the passing from office of the Collector to whom the bond was given, we submit that it would be contrary to the manifest purpose of the statute here involved to hold that noncompliance with its terms had the effect of destroying not only the pending proceeding, but also the cause of action. This statute did not purport to deal with substantive rights; it merely provided a procedure whereby under certain circumstances suits which otherwise would have abated might be con-

tinued in order to obtain a settlement of the question involved. It was not designed to affect the rights and obligations of public officers or to take away causes of action where as a matter of substantive law they continued to exist after a suit by or against a former officer has abated. The common law right to bring this second suit may not be taken away by mere implication. *Continental Secur. Co.* v. *Interborough R. T. Co.*, 193 N.Y.S. 892, 896.

Furthermore, the construction placed upon the statute by the courts below has the effect of imposing a time limitation upon the enforcement of rights accruing under bonds given to public officers to insure the collection of the revenue of six months after a change in office *pendente lite* — a result which Congress could hardly have intended. Cf. *United States* v. *John Barth Co.*, *supra*.

In *habeas corpus* proceedings instituted against a Commissioner of Immigration or a United States Marshal which have abated for want of timely substitution, the right to bring a new suit against the successor in office has never been doubted. *United States ex rel. Claussen* v. *Curran*, 276 U.S. 590; cf. *United States ex rel. Claussen* v. *Day*, 279 U. S. 398; *Mathues* v. *United States ex rel. Cunningham*, 282 U.S. 802; cf. *Fetters* v. *United States ex rel. Cunningham*, 283 U.S. 638. If the failure to substitute in such a case does not preclude the bringing of a new suit, we are unable to see why it should do so in a case like the instant one. In the cases cited the new suit was undoubtedly based upon a continuing of the

alleged illegal official conduct by the successor in office, which gave rise to a cause of action against such incumbent. In this case the bond in terms created a continuing obligation running to the successor in office, which gave to such successor a right of action on the bond.

We submit the court below clearly erred in holding that the abatement of the earlier suit destroyed the cause of action.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

SEWALL KEY,
J. P. JACKSON,
Special Assistants to the Attorney General.

W. MARVIN SMITH,
Attorney.

NOVEMBER 1933.

APPENDIX

STATUTE INVOLVED

Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (U.S.C., Title 28, Sec. 780):

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

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